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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MARK GEGAJ,

Petitioner,

v.

MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Mark Gegaj asks that this Court issue a writ of certiorari to resolve the United States Courts of Appeals inconsistent treatment and usage of Department of State Country Reports, as reflected in the judgment of the Court of Appeals for the Second Circuit.

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Gegaj v. Mukasey*, Docket No., 07-3029, is attached to this petition as Appendix A at 1a and Appendix B at 3a. The agency opinions issued by the Board of Immigration Appeals, *In re Mark Gegaj*, No. A 95 146 530 (BIA June 29, 2007; BIA February 26, 2004), are attached hereto as Appendix C at 9a and Appendix D at 12a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment denying the timely submitted petition for rehearing on May 7, 2008. The mandate was subsequently issued by the Second Circuit on May 14, 2008. The Court of Appeals denied Mr. Gegaj's timely petition for review of the decision of the Board of Immigration Appeals on February 1, 2008. The order denying review of the agency appeal is attached hereto as Appendix B, App. 3a. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprive Mr. Gegaj of his rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No

person...shall be deprived of life, liberty, or property, without due process of law."

I. STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Courts of Appeals' inconsistent use and treatment of Country reports furnished by the United States Department of State. Such inconsistency is evident in the Court of Appeals for the Second Circuit's decision in the matter at bar, which decision is in contravention of its own precedent. The Court of Appeals' decision is therefore arbitrary, capricious, and a clear violation of Mr. Gegaj's Fifth Amendment rights. The decision below also exposes Mr. Gegaj to the certainty of cruel and unusual punishment upon his return to Albania, in violation of the Eighth Amendment. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decision below.

Petitioner appeared before the Honorable Douglas B. Schoppert for a hearing on the merits of his applications. On October 3, 2002, the IJ denied Petitioner's request for asylum pursuant to §208 of the Immigration and Nationality Act (hereinafter "INA"), withholding of removal pursuant to INA § 241(b)(3), and withholding of removal under Article III of the Convention Against Torture. Petitioner appealed the IJ's decision to the BIA. Through an order dated February 26, 2004, the BIA affirmed the IJ's opinion, thereby dismissing Petitioner's appeal. (JA 165-166). *See* Appendix D, App. 12a.

Petitioner later filed a motion to reopen his proceedings based on previously unavailable material evidence, and changed country conditions since the time of the original hearing. The BIA denied the motion to reopen through its decision dated June 29, 2007. *See* Appendix C, App. 9a.

Petitioner subsequently appealed the BIA's decision to Court of Appeals for the Second Circuit. Petitioner argued that he presented testimony sufficient to meet the standard for a showing of past persecution, as well as a reasonable, well-founded fear of future persecution. Petitioner argued that the past persecution he suffered at the hands of the communist sympathizers as a result of his political opinion would undoubtedly resume were he forced to return to Albania. On February 1, 2008, the Court of Appeals for the Second Circuit denied Petitioner's appeal for review of the BIA's decision. *See* Appendix B, App. 3a. Petitioner then filed a Petition for Rehearing with the Court of Appeals for the Second Circuit, which denied his Petition on May 7, 2008. *See* Appendix A, App. 1a.

II. SUMMARY OF THE ARGUMENT

Mr. Gegaj hereby asserts that the Court of Appeals for the Second Circuit, in contravention of its own precedent, violated his Fifth Amendment rights to due process of law by denying his Petitions for Review and Rehearing and improperly relying on United States Department of State Country Reports, issued subsequent to the close of the proceedings below. The Second Circuit departed from its own precedent and those of its sister circuits, in finding that the country conditions in Albania had changed sufficiently to

prevent Petitioner from claiming a well-founded fear of persecution if returned. This finding was based on a country report that was issued after the close of the proceedings below and over a year prior to the Second Circuit's most recent decision.

III. ARGUMENT IN SUPPORT OF PETITION

A. The Court of Appeals for the Second Circuit Abrogated Petitioner's Rights to a Full and Fair Hearing by Relying on the findings of *Hoxhallari v. Gonzales*, to Establish Country Conditions in Albania.

1. Department of State Country Reports on Human Rights Practices are insufficient to conclusively rebut a claim of a well-founded fear of future persecution.

This Court should review the decision of the Second Circuit because State Department Reports cannot effectively rebut the presumption of future persecution for a Petitioner. To be eligible for a grant of asylum, an alien must first show that he or she is a "refugee" within the meaning of Section 101(a)(42) of the Immigration and Naturalization Act. *See* INA §101(a)(42). To make this showing, an alien must prove that he or she is either unable or unwilling to return to his or her country based upon past persecution suffered or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). "Persecution," as employed in the

statute, has been defined by the Board of Immigration Appeals and generally accepted by the United States Circuit Courts of Appeals as meaning "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded offensive." *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Li v. Attorney General of the U.S.*, 400 F.3d 157 (3d Cir. 2005); *Montoya-Ulloa v. INS*, 79 F.3d 930 (9th Cir. 1996); *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986). Where an alien establishes that he or she has suffered past persecution, he or she is still eligible for asylum or withholding of removal based on presumption that such alien has a well-founded fear of future persecution. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 176 (2d Cir. 2004) (*citing Melgar de Torres v. Reno*, 191 F.3d 307, 311 (2d Cir. 1999)). *See also Chen v. INS*, 359 F.3d 121, 134 (2d Cir. 2004) ("If an applicant establishes that he has suffered past persecution, he shall be presumed to have a well-founded fear of future persecution on the basis of the same claim"). Alternatively, where an alien seeks to establish his or her status as a refugee upon a showing that he or she holds a well-founded fear of future persecution, the alien must present credible testimony that he subjectively fears persecution and establish that his fear is objectively reasonable. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 176 (2d Cir. 2004) (*citing Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999)). An alien who has not suffered past persecution is nonetheless eligible for the relief of asylum or withholding of removal based on a fear of future persecution. *See Alvarez-Flores v. INS*, 909 F.2d 1 (1st Cir. 1990); *Kratchmarov v. Heston*, 17 F.3d 551 (8th Cir. 1999); *INS v. Cardoza-Fonseca*, 767 F.2d 1448 (9th Cir. 1986).

Under 8 C.F.R. §§208.13(b)(1)(i), 1208.13(b)(1)(i) an applicant who establishes past persecution is presumed to have a well founded fear of future persecution. The fear of persecution experienced by an applicant for asylum in the future can however be rebutted by a showing by the government that the alien no longer has reason to fear persecution or harm. The government may effectively rebut the presumption of a future fear of persecution by demonstrating either 1) that there has been a *fundamental change in circumstances* such that the applicant no longer has a well founded fear; 2) that the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality. *See* 8 C.F.R. §§208.13(b)(1)(i)(A) & (B), 1208.13(b)(1)(i)(A) & (B).

A given alien's claim for asylum must necessarily be understood within the context of the current political situation existing in such alien's native country. *Yang v. McElroy,* 277 F.3d 158 (2d Cir. 2002) (*remanding* to the BIA for more current reports where there was a four-year delay between the BIA decision and the IJ decision which relied on a five-year-old State Department Country report); *Asasni v. INS,* 154 F.3d 719, 725-26 (7th Cir. 1998) (*remanding* the matter to the BIA to permit applicant to file a motion to reopen where conditions changed in country subsequent to BIA denial); *Cordero-Trejo v. INS*, 40 F.3d 482, 490-91 (1st Cir. 1994) (*reversed* BIA denial of asylum where testimony and evidence not considered "in light of general conditions" in country as required by 8 C.F.R. §208.13(a)). To this end, the Board of Immigration Appeals has taken a view to requiring the inclusion of general background information about the alien applicant's native country in the record of

proceedings as a foundation for the alien's claim. *See also Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997) (*criticizing* uncorroborated claims about country conditions). The Board of Immigration Appeals has asserted its reliance on the Profile of Asylum Claims and Country Conditions reports issued by the Department of State, which are prepared pursuant to 8 C.F.R. §§208.11(a), 1208.11(a), and the United States government's view of country conditions in specific countries, and frequently regards the findings set forth in such reports as dispositive of issues pertaining to country conditions within the context of asylum/removal proceedings. *Matter of R-S-H- et al.*, 23 I&N Dec. 629, 643 (BIA 2003) (In a case involving Lebanon the Board of Immigration Appeals emphasized that the Immigration Judges and the Board frequently rely on Department of State Country Reports); *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (*denying* asylum based on a finding of no evidence of country wide persecution pursuant to a Department of State profile for Peru stating that Sendero Luminosa has reduced ability to act and operate in only in only a few areas of Peru); *Matter of V-T-S-*, 21 I&N Dec. 792, 798-799 (BIA 1997) ("Country condition profiles described by the State Department have been found to be 'the most appropriate and perhaps best resource for information on conditions in foreign nations.'")

Even where such documents are used frequently in courts to provide a view of the conditions existent in foreign nations, the probative value and weight accorded to such reports ought to be limited. Courts use these reports in the context of asylum/removal proceedings when introduced for the purpose of

rebutting a presumption of a well-founded fear of future persecution pursuant to a finding of past persecution, or alternatively to rebut a claim of a well-founded fear of future persecution. Specifically of concern is the disregard of the relative impartiality of the reports, and the circumstances attendant to their issuance, in utilizing the reports as conclusive authority of the conditions in a given country. The Reports by the Department of State do not provide an adequate basis, due to their unreliability and the vagueness of their language to conclusively provide a rebuttal to the fear of future persecution. At least one Circuit Court of Appeals has noted that Department of State Country Reports may be more akin to litigation documents than accurate analyses of a country's prevailing conditions, and other courts have cautioned against the use of country reports as a means of discrediting an applicant's testimony. *Koliada v. INS,* 259 F.3d 482, 487-88 (6th Cir. 2001) (In referring to the State Department reports the court found that: "It stands to reason that a report produced by one executive department to aid the litigation of another executive department would often support the second department's point of view."); *Mece v. Gonzales,* 415 F.3d 562, 573 (6th Cir. 2005) (*finding* that simply because there is a difference of opinion between the Department of State report and the respondent's description regarding the political coloration of the Socialist government in Albania, the differing descriptions do not reflect on respondent's credibility); *Tian-Yong Chen v. INS,* 359 F.3d 121, 130-32 (2d Cir. 2004) (*finding* that the court should not place "excessive reliance" on State Department reports which "are sometimes skewed toward the governing administration's foreign-policy goals and concerns"

including "half-truths about human rights abuses in friendly countries.") These reports have no probative value whatsoever, and courts have found that State Department reports relating country conditions are more like litigation documents than accurate analysis. *See Koliada* v. INS, 259 F.3d 482, 487-88 (6th Cir. 2001). The Sixth Circuit in *Koliada* referred to the State Department reports and found that they were essentially manufactured documents which purport to bolster the litigation position of the government: "It stands to reason that a report produced by one executive department to aid the litigation of another executive department would often support the second department's point of view." Id at 487-88.

Similarly, one court has stated that the State Department records should not accorded wide latitude of credence given the tendency to oversimplify the situation in foreign nations. Courts have stated that the reports "cannot substitute for an individualized determination of an asylum or withholding claim; we have cautioned against 'over-reliance' on the Country Reports because of their potential for bias and the inability of asylum seekers to question their conclusions." *See Zheng v. Gonzales*, 409 F.3d 804, 810–11 (7th Cir. 2005); *See also He Chun Chen v. Ashcroft*, 376 F.3d 215, 225–26 (3d Cir. 2004) (Court criticized the heavy reliance on "nothing more" than the DOS Country Report because such Reports are not the "Holy Writ" and the BIA "cannot hide behind the State Department's letterhead")); See *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405–08 (3d Cir. 2003) [holding that the letters of Director of Office of Country Reports and Asylum Affairs in DOS reports are double and triple hearsay). *See Galina v. INS*, 213 F.3d 955,

958–599 (7th Cir. 2000) Statements in Country Reports are not only not incontestable, they "are not even facts"; "[T]he Board should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ."); See also *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997)("There is perennial concern that *the Department soft pedals human rights violations by countries that the United States wants to have good relations with*") (emphasis added).

However, in coming to its decision in the matter at bar, the Court of Appeals for the Second Circuit explicitly relied upon such a report, stating, "the 2006 U.S. Department of State Country Report on Human Rights Practices in Albania does not mention the persecution or torture of Democratic Party members and, further states that there were no political detainees that year." *Gegaj v. Mukasey*, 07-3029-ag, February 1, 2008, (2d Cir.) citing *Hoxhallari v. Mukasey*, 468 F.3d 179, 185-186 (2d Cir. 2006). The Court then found that Petitioner did not have a well-founded fear of persecution if returned to Albania and consequently, denied his petition for review. Given the real concerns of the Circuit courts in assessing the probative value of the Department of State reports, and the Second Circuit's reliance on such a report in the case at bar, the issue begs determination by this Honorable Court, and a writ of certiorari is appropriate to provide definitive guidance on the value of such reports.

2. The Federal Circuit Courts of Appeals are not in agreement as to the probative value of Department of State Reports as applicable in the context of asylum/removal proceedings, thus presenting a federal question reviewable by this Honorable Court.

The Circuit Courts of Appeal are sharply divided over the sufficiency and value of the Country Reports offered by the Department of State. There is a decided split in the circuit courts with respect to the probative value of Department of State country reports presenting a federal question for review by this Honorable Court. Some circuits allow for "administrative notice" of facts and opinions set forth in Department of State reports. *See e.g., Gonahasa v. INS*, 181 F.3d 538, 542 (4th Cir. 1999) (*finding inter alia* that the State Department profile reports are "highly probative ... in a well founded fear case" and further finding that in "most cases" such reports will provide substantial evidence which can conclusively be used to overcome the presumption of future fear of persecution) *See also, Vaduva v. INS*, 131 F.3d 689 (7th Cir. 1997) (*finding* INS overcame presumption based on its proffer of a State Department report for the country of Romania, however the court rejected the proffer of an Amnesty International report). Other Courts have taken a view to assigning them very little evidentiary weight resulting in the soft-peddling of persecutory conditions in the alien's native country in the interest of diplomacy. *See e.g Leiva-Montalvo v. INS*, 173 F.3d 749, 751–52 (9th Cir. 1999) (INS introduction of State Dept. report describing improvements in human rights situation insufficient

to overcome presumption); *See also Del Carmen Mr. Gegajna v. INS,* 170 F.3d 1247, 1250 (9th Cir. 1999) (Must show how changed country conditions "will affect the specific petitioner's situation ... Information about general changes ... is not sufficient."); *See e.g. Duarte de Guinac v. INS*, 179 F.3d 1156, 1163–64 (9th Cir. 1999) (*finding* that Guatemalan Profile failed to rebut specific facts of persecution suffered by the Respondents).

In assessing the objectiveness of the future fear held by the Petitioner, the Court of Appeals relied on the evidence presented by the Department of State. The issue of whether Department of State records provide a sufficient measure of the situation in Albania as it relates to the future fear of the Petitioner, or, for that matter, of any applicant for asylum who bases the gravamen of their case on the future fear of persecution is not settled. Sister courts are not in agreement over the utility of the Department of State records, or Country Reports professing to provide an accurate picture of the situation in any given country. At least one court has recognized that "a State Department report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution." See *Mr. Gegajna-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002). *See also Ali v. Ashcroft*, 394 F.3d 780, 788 (9th Cir. 2005)(*holding* that a past persecution claim cannot be rebutted by relying on general conditions in a country contained in a DOS report). Similarly, the Eighth Circuit has followed the Ninth Circuit in demanding that Department of State reports be evaluated more stringently to assess whether they actually speak

directly to the matter before such reports can be used to rebut effectively a fear of future persecution based on changes in country conditions. *See Awale v. Ashcroft*, 384 F.3d 527, 531–32 (8th Cir. 2004) (*finding* that the administrative record, which included the State Department report, was inadequate in that it did not contain substantial evidence rebutting past persecution because of changed country conditions in Somalia.). Similarly, in *Berishaj v. Ashcroft*, 378 F.3d 314, 326–28 (3d Cir. 2004), the Third Circuit ruled that where:

> "[T]he Immigration Judge misapplied the law in concluding that changed conditions in Montenegro have obviated any persecution claim that Berishaj might once have had. In such a posture, the burden of showing changed country conditions is on the government... we hold that the government must rebut the alien's well founded fear of future persecution with specific evidence, which it did not produce" See *Berishaj v. Ashcroft*, 378 F.3d 314, 326–28 (3d Cir. 2004)

In *Berishaj*, the Third Circuit warned against complete reliance on these Country reports and discredited their probative value:

> "In many cases in which country conditions are at issue, the administrative records are *grossly out-of-date, requiring us to engage in the rather artificial exercise of ruling on situations that existed several years in the past, but do not exist today*. Here, we work from an administrative record in which the most recent country

> conditions report is over four years out-of-date. While *SEC v. Chenery Corp.*, 318 U.S. 80, 87 L. Ed. 626, 63 S. Ct. 454 (1943), and the constraints of process-based review of administrative decision making prevent us from supplementing a grossly out-of-date administrative record, they do not command blindness to the emerging pattern of stale records. Considering the rapid, frequent political changes in countries from which asylum and CAT applicants usually come, and the potentially dire consequences of sending such an applicant back to his country of origin to face possible persecution or torture on the basis of such a stale report, we call on Congress, the Department of Justice, the Department of Homeland Security, and the BIA to improve the structure and operation of the system, so that all may have the confidence that the ultimate disposition of a removal case bears a meaningful connection to the merits of the petitioner's claim(s) in light of contemporary world affairs." *Id.* at 328. (Emphasis added)

Despite such findings discrediting these reports, some courts have desperately clung to the notion that the State Reports provide an adequate account of the conditions existent in a country. The Seventh Circuit has ruled in *Brucaj v. Ashcroft,* 381 F.3d 602, 605–08 (7th Cir. 2004) that the Government met the burden and effectively did rebut an ethnically Albanian-claimant of persecution by presenting country reports and demonstrating regime political changes in the structure of governance in the former Yugoslavia.

Similarly, the First Circuit has adamantly relied on these reports, stating that "the Board of Immigration Appeals is entitled to rely on the State Department's country reports as proof of country conditions described therein, although it must also consider evidence in the record that contradicts the State Department's descriptions and conclusions." *See, e.g., Zarouite v. Gonzales,* 424 F.3d 60, 63-64 (1st Cir. 2005). See also *Waweru v. Gonzales*, 437 F.3d 199, 203–05 (1st Cir. 2006) (*affirming* an Immigration Judge's finding that past persecution from Kenya under the Moi regime was rebutted while abstaining to conclusively deciding whether a particularized showing of changed country conditions was warranted). *But see Mihaylov v. Ashcroft*, 379 F.3d 15, 23 (1st Cir. 2004) (*finding* that changes in a political regime does not necessarily rebut past persecution as it does not "necessarily eliminate the objective basis for an applicant's fear of persecution at the hands of his former oppressors.") The First Circuit Court of Appeals has acknowledged that uncertainty exists with respect to the sufficiency and value of country reports:

> "Some of our decisions suggest that changed country conditions cannot suffice without a more particularized showing, *see, e.g., Hernandez-Barrera v. Ashcroft,* 373 F.3d 9, 24-25 (1st Cir. 2005), and some suggest the contrary, *see, e.g., Quevedo v. Ashcroft*, 336 F.3d 39, 44 (1st Cir. 2003); but the reconciling (and most accurate) proposition is that changed country conditions "do not *automatically* trump" the applicant's specific evidence. *Fergiste v. INS*, 138 F.3d 14, 19 (1st Cir. 1998) (emphasis

> added); *see also Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 36 (1st Cir. 2005). The surrender of the British at Yorktown in 1781 did not negate the potential threat to Tories; it probably did as to the Patriots." See *Waweru v. Gonzales*, 437 F.3d 199, 203–05 (1st Cir. 2006)

In the instant matter the Second circuit cites to *Hoxhallari v. Gonzales* 468 F.3d 179 (2d Cir. 2006), to demonstrate that conditions in Albania have improved. In *Hoxhallari*, the Second Circuit relied on a Department of State Country report from 2006. To extend that finding to the case at bar leaves the Petitioner's claims subject to the alleged conditions in his country *nearly two years ago*. By so affirming the decision of the BIA, the decision of the Court of Appeals for the Second Circuit is at variance with the decisions of other U.S. Courts of Appeals with respect to the weight to be accorded to country conditions reports issued by the U.S. Department of State. In Tota, the First Circuit Court noted that:

> While "[t]he advice of the State Department is not binding," Gailius v. INS, 147 F.3d 34, 45 (1st Cir. 1998) (citations and internal quotation marks omitted), State Department reports are "generally probative of country conditions." Palma-Mazariegos v. Gonzales, 428 F.3d 30, 36 (1st Cir. 2005). Evidence in these reports *never "automatically trump[s]" petitioner's specific evidence*, Waweru v. Gonzales, 437 F.3d 199, 203 (1st Cir. 2006) (citations and internal quotation marks omitted) (emphasis in original), and is "open to contradiction." Zarouite v. Gonzales, 424 F.3d 60, 63 (1st Cir.

> 2005). Further, "*abstract evidence of generalized changes in country conditions, without more, cannot rebut a presumption of a well-founded fear of future persecution.*" Palma-Mazariegos, 428 F.3d at 35. [Emphasis Added].

Similarly, in *Tian-Yong Chen v. INS*, 359 F.3d 121 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit stated that

> . . . State Department reports are usually the result of estimable expertise and earnestness of purpose, and they often provide a useful and informative overview of conditions in the applicant's home country. But their observations do not automatically discredit contrary evidence presented by the applicant, and they are not binding on the immigration court. [Citations omitted.] Thus, where a report suggests that, in general, an individual in the applicant's circumstances would not suffer or reasonably fear persecution in a particular country, the immigration court may consider that evidence, *but it is obligated to consider also any contrary or countervailing evidence with which it is presented*, as well as the particular circumstances of the applicant's case demonstrated by testimony and other evidence. [Emphasis Added.]

Given the divergence of the Circuit Courts, the issue of whether State Department reports and Country Conditions ought to be considered probative and authoritative to rebut claims by applicants such as Mr. Gegaj's of a fear of future persecution if forced to

return to his native country merits review by this Honorable Court. Thus, by granting certiorari in this matter, this Honorable Court can settle the question of the incongruity within the various courts.

B. <u>The probative value accorded to and the consideration of the Department of State Country Report on Albania by the Court of Appeals for the Second Circuit as a basis to discredit Petitioner's claim of a well-founded fear of future persecution, was inappropriate and violative of the Fifth Amendment.</u>

1. The dissention amongst the Circuit Courts of Appeals as to the probative weight of Department of State country reports has resulted in differing evidentiary burdens for similarly situated aliens in contravention of their Fifth Amendment right to due process.

The Fifth Amendment to the Constitution grants, in pertinent part, due process of law before a person can be deprived of life, liberty or property. *See* U.S. Const., Fifth Amend. It is well settled that this Honorable Court has extended Fifth Amendment guarantees of the due process of law to aliens in removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 307 (1993); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). This Honorable Court has held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as

fundamental". *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934).

At stake in removal proceedings is the potential deprivation of a significant, constitutionally protected liberty interest, and often the very life and freedom of the petitioning aliens. Accordingly, removal proceedings must be conducted in a manner which upholds the principles of fundamental fairness and substantial justice. *See Bridges v. Wixon*, 326 U.S. 135 (1945); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Ng Fung Ho v. White*, 259 U.S. 276 (1922). In removal proceedings involving a claim for asylum, the burden of proof for establishing eligibility for asylum lies with the petitioner. *See Diab v. Ashcroft*, 397 F.3d 35, 39 (1st Cir. 2005); 8 C.F.R. § 1208.13(a). This burden can be met by proving past persecution or a well-founded fear of future persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1). Pursuant to 8 C.F.R. §§208.13(b)(1)(i), 1208.13(b)(1)(i) an applicant who establishes past persecution is presumed to have a well founded fear of future persecution. The fear of persecution experienced by an applicant for asylum in the future can however be rebutted by a showing by the government that the alien no longer has reason to fear persecution or harm. Furthermore, an applicant's testimony alone, "if credible, may be sufficient to sustain the burden of proof without corroboration," 8 C.F.R. § 1208.13(a), but if the applicant is found not to be entirely credible, corroborating evidence "may be used to bolster an applicant's credibility." *Diab*, 397 F.3d at 39.

Department of State country reports are almost invariably admitted into evidence during the course of removal proceedings based on a claim of asylum, and are used concomitantly to corroborate and/or discredit an applicant's testimony at trial. Particularly problematic is the use of such reports to conclusively rebut a presumption or claim of a well founded fear of future persecution; as such a finding improperly effectuates a shifting of the burden of proof back to the alien. Thus, aliens who have established a claim of well founded fear of future persecution and whose proceedings are before a Circuit Court that deems Department of State reports to be of substantial probative weight, must effectively bear an increased burden of proof when the report is used by the government to conclusively rebut such claim and shift the burden back to the alien. In contrast, a similarly situated alien in a circuit that assigns little probative weight to the state reports would benefit from a higher threshold showing by the government, before his or her claim of a well founded fear of persecution is successfully rebutted and the burden is shifted back to the alien. This disparate employment of State Department reports as evidence conclusive enough to discredit an alien's claim of a well founded fear of persecution has the perverse effect of requiring similarly situated alien asylum applicants to meet substantially different burdens of proof depending upon the circuit that the alien's proceedings are before.

In the case at bar, Mr. Gegaj is in danger of being returned to a country where both his grandfather and father were murdered for their political activism, and where Mr. Gegaj himself was savagely beaten for the self-same trait. Given the substantial liberty interests

at stake in asylum proceedings, the judicial process afforded to alien asylum applicants must necessarily entail more than a fortuitous application of evidentiary standards for their right to due process pursuant to the Fifth Amendment to be preserved. The incongruent treatment of Department of State reports by the circuit courts within the context of removal/asylum proceedings undermines the due process guarantees afforded to aliens in removal/asylum proceedings. As such, adjudication as to the probative value of State Department country reports by this Honorable Court is merited.

2. The Court of Appeals for the Second Circuit based its decision on a Department of State Country Report issued subsequent to the close of the record in the proceedings under review in contravention of the Due Process guarantees set forth in the Fifth Amendment.

In its decision denying Mr. Gegaj's appeal of the BIA's denial of his Motion to Reopen, the Second Circuit ultimately based its finding on a State Department report issued *after* the record of proceedings was closed. That the Second Circuit relied upon this report, released over a year prior to the Circuit Court's decision, and covering the period two years prior, without any regard to countervailing country conditions reports which the Petitioners might have presented, violated Petitioner's Fifth Amendment rights. The Second Circuit's affirmance violated its own precedent, and was in contravention of the concerns raised by its sister circuits, thus depriving

Mr. Gegaj of his right to Due Process pursuant to the Fifth Amendment. *See Adjin v. Bureau of Citizenship and Immigration Services,* 437 F.3d 261 (2d Cir. 2006); *De la Llana-Castellon v. INS,* 16 F.3d 1093, 1099-1100 (10th Cir. 1994); *Castillo-Villagra v. INS,* 972 F.2d 1017, 1029 (9th Cir. 1992).

In view of the widespread use of Department of State country reports, and the dissention amongst the circuit courts as to the propriety of taking administrative notice of findings set forth in these reports, there exists a very real risk that aliens such as Mr. Gegaj will be subject to an institutional deprivation of his right to due process within the context of his removal proceedings. The review of this Honorable Court is thus warranted to ensure that the constitutional safeguards afforded to such individuals as set forth in the Fifth Amendment are preserved.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant certiorari and schedule this matter for briefing and oral argument to ensure the opportunity for Mr. Gegaj to have the merits of his meritorious appeal reviewed by the Court of Appeals for the Second Circuit.

Respectfully submitted,

CHRISTOPHE & ASSOCIATES, P.C.

BY:

CHARLES CHRISTOPHE, Esq.
Counsel of Record
2 Wall Street, 8th Floor
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212.344.3800

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
Clerk of Court

No. 07-3029-ag

[Filed May 7, 2008]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of May two thousand and eight,

Mark Gegaj,	)
	)
Petitioner,	)
	)
v.	)
	)
Michael B. Mukasey, United States Attorney General,	)
	)
Respondent.	)
	)

ORDER

Petitioner having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez
Frank Perez, Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NAC: 07-3029-ag
BIA: A 95 146 530

[Filed February 1, 2008]

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH

AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of February, two thousand eight.

PRESENT:

HON. PIERRE N. LEVAL,
HON. SONIA SOTOMAYOR,
HON. RICHARD C. WESLEY,
Circuit Judges.

Mark Gegaj,	)
Petitioner,	)
	)
v.	)
	)
Michael B. Mukasey, United States Attorney General,[1]	)
Respondent.	)

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case.

FOR PETITIONER: Charles Christophe, New York, New York.

FOR RESPONDENT: Jeffrey S. Bucholtz, Acting Assistant Attorney General; James E. Grimes, Office of Immigration Litigation; Michael H. Park, Office of Legal Counsel, U.S. Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review is DENIED.

Petitioner Mark Gegaj, a native and citizen of Albania, seeks review of a June 29, 2007 order of the BIA denying his motion to reopen removal proceedings. *In re Mark Gegaj*, No. 95 146 530 (B.I.A. June 29, 2007). We assume the parties' familiarity with the underlying facts and procedural history in this case.

When the BIA denies a motion to reopen, this Court reviews the BIA's decision for an abuse of discretion. *See Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005). An abuse of discretion may be found where the BIA's decision "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner." *Ke Zhen Zhao*

v. U.S. Dep't of Justice, 265 F.3d 83, 93 (2d Cir. 2001) (internal citations omitted).

The BIA did not abuse its discretion in denying Gegaj's motion as untimely. *See* 8 C.F.R. § 1003.2(c)(2). The final order in these proceedings was entered by the BIA in February 2004, and Gegaj did not file his motion to reopen until April 2007, well beyond the 90-day filing deadline. 8 C.F.R § 1003.2(c)(2).

Furthermore, the BIA reasonably found that Gegaj failed to establish that he qualified for an exception to the time limitation for motions to reopen. These limitations do not apply if the motion to reopen is based on "changed circumstances arising in the country of nationality or in the country to which deportation has been ordered." 8 C.F.R. § 1003.2(c)(3)(ii). Here, the BIA reasonably found that Gegaj had not demonstrated a change in circumstances in Albania where: (1) some of the evidence he submitted in support of his motion to reopen was cumulative with evidence that was previously considered; (2) he failed to demonstrate that the evidence could not have been presented at the hearing below; and (3) the evidence does not demonstrate a change in circumstances in Albania.

As the BIA found, much of the evidence Gegaj submitted in support of his motion to reopen addressed the persecution of his father and grandfather, which occurred years ago. As such, this evidence was previously available and failed to demonstrate a change in circumstances in Albania. 8 C.F.R. § 1003.2(c)(3)(ii). Gegaj did not provide any evidence in support of his assertion that "dangers associated with

obtaining the documents from Albania" prevented him from submitting them at an earlier date. In addition, the evidence Gegaj submitted regarding incidents in which individuals shot at the office of a Democratic Party candidate and a crucifix was knocked over fail to demonstrate that he would be persecuted or tortured for being a Democratic Party member. Moreover, the 2006 U.S. Department of State Country Report on Human Rights Practices in Albania does not mention the persecution or torture of Democratic Party members and, further, states that there were no reports of political prisoners or detainees that year. *See Hoxhallari v. Gonzales*, 468 F.3d 179, 185-86 (2d Cir. 2006) (describing a "substantial change" towards democracy now that the Democratic Party is in power in Albania).

To the extent that Gegaj challenges the agency's adverse credibility determination, his arguments are beyond this Court's purview. A petitioner must file a petition for review of a BIA order within thirty days of the entry of that order. *See Paul v. INS*, 248 F.3d 43, 45 (2d Cir. 2003); 8 U.S.C. § 1252 (b)(1). Accordingly, we have jurisdiction to review only the BIA's June 2007 order denying his motion to reopen. *See* 8 U.S.C. § 1252(b)(1). Accordingly, the BIA properly denied Gegaj's motion and provided adequate reasoning for doing so. *See Ke Zhen Zhao*, 265 F.3d at 93.

For the foregoing reasons, the petition for review is DENIED. The pending motion for a stay of removal in this petition is DISMISSED as moot. The pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate

Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

FOR THE COURT:
Catherine O' Hagan Wolfe, Clerk

By: _____

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A95-146-530 - New York, NY Date: JUN 29 2007

In re: GEGAJ, MARK

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Meyerovich Marina, Esq

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated February 26, 2004. On February 26, 2004, this Board affirmed, without opinion, the Immigration Judge's decision at which time we dismissed the respondent's appeal from the Immigration Judge's denial of the application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act and relief under the

Convention Against Torture, 8 C.F.R. § 1208.16(c). Pursuant to 8 C.F.R. § 1003.2(c)(2), a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant case, a motion to reopen would have been due on or before May 24, 2004. The record reflects, however, that the Board did not receive the motion until April 5, 2007. The motion to reopen was therefore filed out of time. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not responded to the pending motion.

The new evidence submitted in support of reopening includes a personal affidavit of the respondent, a February 2007 statement from a minister to the effect that he has been acquainted with the respondent for 5 years and that he is honest and trustworthy, and 2007 affidavits of the respondent's sister and uncle describing events which reportedly occurred prior to the respondeat's departure from Albania. The respondent has also submitted copies of various documents such as his passport, membership cards, his father's death certificate, declarations and affidavits regarding the political activities and contributions of the respondent and other members of his family and the execution of his grandfather in 1958. Some of this evidence is cumulative in nature as it is consistent with evidence previously considered, and the respondent has not shown that the evidence which is new could not have been obtained and presented at the hearing below. The respondent has also submitted evidence of country conditions in Albania consisting of the U.S. Department of State's 2006 Country Reports on Human Rights Practices in

Albania, released on March 6, 2007, and recent newspaper articles. However, the respondent has not established that he is entitled to an exception to the filing requirements for reopening. The material on country conditions proffered with the motion does not demonstrate meaningfully changed conditions in Albania pertinent to this respondent's claims from the conditions in Albania when the case was before the Immigration Judge. 8 C.F.R. § 1003.2(c)(3)(ii). Consequently, neither reopening nor a stay of removal is warranted. Accordingly, the motion is denied.

/s/
FOR THE BOARD

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NAC No. 04-1135-ag

[Filed January 4, 2006]

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 4th day of January, two thousand and six.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. ROSEMARY S. POOLER,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Mark Gegaj,	)
Petitioner,	)
	)
-v-	)
	)
Alberto R. Gonzales,[1]	)
Attorney General	)
Respondent.	)
	)

FOR PETITIONER: Charles Chistophe, Esq., Christophe & Associates, P.C., New York, New York.

FOR RESPONDENT: Jonathan S. Gasser, Acting United States Attorney for the District of South Carolina, Jennifer Aldrich, Assistant United States Attorney, Columbia, South Carolina.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals, it is hereby **ORDERED, ADJUDGED, AND DECREED** that the petition for review is **DENIED.**

Mark Gegaj, a citizen of Albania, petitions for review of a final order of the Board of Immigration

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as respondent in this case.

Appeals (BIA) affirming an immigration judge's (IJ) decision, which denied Gegaj's application for asylum, withholding of removal and relief under the Convention Against Torture (CAT). We assume the parties' familiarity with the underlying facts and procedural history of the case.

This Court reviews the agency's factual findings, including adverse credibility determinations, under the substantial evidence standard. *See* 8 U.S.C. § 1252(b)(4)(B); *Jin Hui Gao v. United States Att'y Gen.*, 400 F.3d 963, 964 (2d Cir. 2005) (per curiam); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178-83 (2d Cir. 2004).

In this case, the IJ's adverse credibility determination was supported by substantial evidence. First, the three major events that formed the basis for the IJ's adverse credibility finding each bore a "legitimate nexus" to the relief that Gegaj was seeking. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003). Gegaj's political activity, and the two alleged attacks on him and his father by political adversaries, were introduced to support his claim that he had a well-founded fear of future persecution, *see* 8 U.S.C. § 1101(a)(42), and that it was more likely than not that his life would be threatened if forced to return to Albania, *see* 8 C.F.R. § 208.16(b)(1).

In addition, the issues that the IJ had with Gegaj's details about those three events were specific and cogent, and not based on speculation or conjecture. *See Secaida-Rosales*, 331 F.3d at 307. Gegaj gave little detail about how he participated in the Democratic Party other than to help with elections and make

"propaganda." He offered no description of how frequently and in what capacity he helped the party, other than to relay that he told people not to vote for the Communists in the October 2000 election.

Gegaj's testimony regarding his father's death was, as the IJ noted, vague on two important issues. Gegaj never was able to explain how he knew that his father had been beaten with wooden sticks. Gegaj also never adequately explained how his father's friends came to know that his father had been murdered by Communists.

The IJ's reliance on problems with Gegaj's testimony about his October 2000 attack as a basis for its adverse credibility finding was, while not as strong as the other two bases, still adequate. The most substantial basis noted by the IJ was that Gegaj provided specific details about the attack only when asked leading questions on redirect. This attack, an alleged violent beating by political adversaries and the only specific instance Gegaj offered of violence that he directly suffered, was the linchpin of his claim for relief.

The other bases for the IJ's adverse credibility finding concerning the October 2000 event were (1) Gegaj's conflicting responses about whether he was injured as a result of the October 2000 attack, and (2) the conflicting reasons Gegaj gave for why he did not leave his house after the attack. Regarding the first basis, it is not clear from the transcript whether Gegaj made an inconsistent statement or if he was merely confused or misspoke. However, mindful of the IJ's unique position to evaluate not only the applicant's

verbatim testimony, but appearance, demeanor, body language and other relevant facts not captured in the hearing transcript, *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73-74 (2d Cir. 2004), we cannot say that on the record before us a "reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. § 1252(a)(4)(B).

The second weaker basis was the IJ's observation that Gegaj "testified at one point that he did not go out for ten days, although he appeared to imply at one point that was because of the seriousness of the injuries," but "later said it was because he was afraid and not because he was injured." Contrary to the IJ's finding, it does not appear that Gegaj ever disavowed one reason, either fear or injury, in favor of the other. Although this basis for the IJ's adverse credibility finding is questionable, remand is inappropriate in this case because this questionable basis is so outweighed by the others that Gegaj would have "no realistic possibility of a different result on remand." *See Cao He Lin v. United States Dep't of Justice*, 428 F.3d 391, 395 (2d Cir. 2005).

The decision of the BIA is accordingly AFFIRMED and the petition for review is DENIED.

Having completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DENIED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: _____

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A95-146-530 - New York

Date:
FEB 26 2004

In re: GEGAJ, MARK

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lombardi, James A., Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/
FOR THE RECORD